U.S. Department of Labor

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Issue Date: 31 January 2007

Case No.: 2005-BLA-05468

In the Matter of

C.C.
Claimant

v.

JIM WALTER RESOURCES, INC.
Employer/Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

C.C.
Pro Se

Thomas J. Skinner, IV, Esquire
For Employer/Carrier

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

[1] The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725.

On January 12, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. A hearing was scheduled to be held before me in Birmingham, Alabama, on December 20, 2006. However, on November 27, 2006 the hearing was cancelled because the parties waived the oral hearing and agreed that the case would be decided based on the evidence of record. In my Order of November 27, 2006, I received Director's Exhibits 1 through 37 ("DX 1-37")[2] and Employer's Exhibits 1 through 6 ("EX 1-6") into evidence. Claimant was allowed until December 12, 2006 to file additional evidence. Claimant did not file additional evidence and did not file a brief. Employer submitted a brief on January 11, 2007. The decision that follows is based upon an analysis of the record, the arguments of the parties and the applicable law.

I. ISSUES

Employer concedes Claimant has 20 years 6 months of coal mine employment. I find the record supports this concession. The following issues are presented for adjudication:

1) whether Claimant has pneumoconiosis;

2) whether Claimant's pneumoconiosis arose out of his coal mine employment;

3) whether Claimant is totally disabled;

4) whether Claimant's total disability is due to pneumoconiosis; and

5) whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed his first claim for benefits on June 6, 1994. (DX 1). On March 17, 1995, the District Director denied the claim and Claimant requested a hearing on March 27, 1995. Administrative Law Judge ("ALJ") Gerald Tierney denied the claim on September 12, 1997 because Claimant failed to establish the presence of pneumoconiosis. (DX 1). Claimant did not appeal ALJ Tierney's decision. Claimant filed his second claim for benefits on February 7, 2000. The District Director denied the claim on May 11, 2000. Claimant requested a copy of his medical report on June 1, 2000. The District Director treated this request as a request for reconsideration and allowed Claimant time to submit additional evidence. Claimant advised the District Director on August 17, 2000 that he had no additional evidence to submit. The District Director closed the claim as of July 28, 2000. (DX 2).

[2] The following abbreviations are used herein: "DX" refers to Director's Exhibits and "EX" refers to Employer's Exhibits.

Claimant filed the instant claim for benefits on September 16, 2002. (DX 4). On July 8, 2003, the District Director determined Claimant did not establish any elements of entitlement and denied the claim. (DX 19). Subsequently, Claimant requested a formal hearing. (DX 20).

B. Factual Background

Claimant was born on October 24, 1931. He divorced his first wife in 1966. (DX 11). Claimant married A.G.B. on October 3, 1968. (DX 4; DX 10). She is his only dependent for the purposes of augmentation of benefits. (DX 4).

As Claimant did not testify at a hearing, I refer to his statements to the Department of Labor and to physicians regarding his coal mine employment and medical histories. Claimant stated that his coal mine employment was in underground mining as a laborer and roof bolter. (DX 6). Claimant's last coal mine employment as a roof bolter required him to load the bolter machine with pins and plates. The plates were five feet long, in bundles of ten that weighed twenty-five pounds per bundle. Claimant also drilled five-foot holes in the roof, inserted glue, and then inserted a pin, spinning the pin for approximately six seconds. Plates were installed on the pins to support the roof. (DX 6). Claimant reported to Dr. Hawkins that he produces yellow sputum, has occasional wheezing at night, dyspnea on walking 200 feet, daily cough, orthopnea, and paroxysmal nocturnal dyspnea. The physician noted Claimant has a history of wheezing and high blood pressure and had smoked less than one pack of cigarettes per day for twenty-two years. (DX 12). Claimant reported to Dr. Goldstein that he smoked one pack of cigarettes per week for eight years. Claimant also reported he has had shortness of breath since 1989 or 1990, a dry cough since 1983 or 1984, and occasional wheezing. (DX 33).

C. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

The record contains prior claims filed in 1994 and 2000. ALJ Tierney denied the 1994 claim because Claimant did not establish the presence of pneumoconiosis. The District Direct did not accept the 2000 claim because Claimant failed to establish any element of entitlement. Therefore, this subsequent claim must be denied unless Claimant demonstrates that one of the applicable conditions of entitlement has changed since the denial of the prior claim. § 725.309(d). Section 725.309(d) also provides that the following rules shall apply in adjudicating subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim,

> provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.
>
> (4) If claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim.

§ 725.309(d).

D. Relevant Medical Evidence

Claimant submitted treatment records from his treating physician, Dr. Ernest Claybon, and from another physician, Dr. Clifton A. Latting. The records appear to cover Claimant's treatment from November 15, 1999 through January 16, 2004. Many of the copied pages are too light and are illegible. The earliest legible record shows Claimant complained of having "black lung" on November 15, 1999. However, it is unclear which physician Claimant saw on that date and whether the physician diagnosed Claimant with black lung.

Dr. Latting's records appear to begin on March 5, 2001 when he concluded Claimant had chronic obstructive pulmonary disease ("COPD") and chronic bronchitis. The physician also noted Claimant had a chronic cough productive of light sputum and shortness of breath on that date. Claimant had a chest X-ray on March 9, 2001, which revealed "no acute disease." Claimant then performed a pulmonary function test on April 3, 2001 that showed a mild obstruction and mild restriction. The record of Claimant's next visit on July 3, 2001 indicated he reported shortness of breath, and follow up for COPD and chronic bronchitis. Claimant again saw Dr. Latting on July 31, 2001 for COPD. The physician noted Claimant did not have significant shortness of breath, but a pulmonary function test revealed a mild obstructive defect. On October 30, 2001, Claimant followed up with Dr. Latting for his COPD and reported problems with coughing and wheezing. The physician noted an examination of the lungs revealed a prolonged exhalation phase.

Claimant's next treatment for COPD occurred on January 4, 2002 where he reported shortness of breath on exertion. Dr. Latting noted the physical examination showed clear lungs. On March 8, 2002, Dr. Latting stated Claimant was suffering from bronchitis and the physical examination showed clear lungs. The physician noted on June 10, 2002 that Claimant's cough had improved and his lungs were clear. Claimant again treated with Dr. Latting for bronchitis on September 9, 2002 and reported he again had a cough. Claimant's next treatment was on December 10, 2002 for COPD. Dr. Latting noted Claimant did not have a cough or shortness of breath at rest. The examination of the lungs showed a prolonged exhalation phase.

On March 10, 2003, Claimant reported occasional wheezing and cough. Dr. Latting noted Claimant's lungs were clear. Claimant also saw Dr. Latting on April 28, 2003 and May 13, 2003 because of pain in his neck and left shoulder. Claimant's next treatment for COPD was on August 12, 2003 where he reported he did not have coughing or wheezing. Claimant had an X-ray on November 25, 2003 that revealed "no significant parenchymal abnormality."

The records from Dr. Claybon appear to begin on January 5, 2004 when Claimant reported shortness of breath. Dr. Claybon noted Claimant was being treated with Combivent inhaler. An electrocardiogram dated January 13, 2004 showed a normal sinus and left atrial enlargement. The last record submitted appears to be for treatment on January 16, 2004 where Claimant reported abdominal pain. (DX 29).

E. Elements of Entitlement – Change in Condition

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

(1) X-ray evidence. § 718.202(a)(1).

(2) Biopsy or autopsy evidence. § 718.202(a)(2).

(3) Regulatory presumptions. § 718.202(a)(3).

a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one of more coal mines prior to June 30, 1971.

(4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

X-ray evidence, § 718.202(a)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains the following chest X-ray evidence.[3]

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS
11/26/02	12/02/02	DX 12	Dr. Ballard	BCR, B	0/0
11/26/02	10/24/03	DX 33	Dr. Wiot	BCR, B	Negative
09/30/03	09/30/03	DX 33	Dr. Goldstein	B-reader	Negative
09/30/03	11/30/05	EX 1	Dr. Wheeler	BCR, B	Negative

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The film taken on November 26, 2002 was interpreted as negative by Drs. Ballard and Wiot. Consequently, I find this X-ray is negative for the presence of pneumoconiosis.

[3] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

The film taken on September 30, 2003 was interpreted as negative by Drs. Goldstein and Wheeler. Accordingly, I find that the chest X-ray is negative for the presence of pneumoconiosis.

Considering all of the X-ray evidence together, I find that the weight of the X-ray evidence does not support a finding of the presence of pneumoconiosis.

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201 (a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment

> significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

The record contains the following physician's opinions.

Dr. Ernest Claybon

Dr. Ernest Claybon, Claimant's treating physician, reviewed Claimant's treatment records and issued a report on August 18, 2004. (DX 29). The physician credited Claimant with over twenty years of coal mine employment and considered a smoking history of three packs of cigarettes per week for an unspecified period ending in 1972. Dr. Claybon diagnosed Claimant with pneumoconiosis in 1988. The physician noted Claimant also suffers from chronic obstructive pulmonary disease ("COPD") and chronic acute bronchitis, both caused by coal dust exposure. Dr. Claybon stated Claimant has complained of chronic cough, congestion, and wheezing. Physical examinations of the lungs have revealed rales and rhonchi. Dr. Claybon opined that Claimant's smoking history is not related to his current breathing problems because Claimant stopped smoking over thirty years prior to manifesting symptoms of a respiratory condition. (DX 29).

Dr. Jeffrey Hawkins

Dr. Jeffrey Hawkins (Board-certified in Internal Medicine and Pulmonary Disease) examined Claimant on November 26, 2002 and issued a report on December 20, 2002. Dr. Hawkins relied on the physical examination, chest X-ray, pulmonary function test, and arterial blood gas study all dated November 26, 2002. The physician credited Claimant with twenty years of coal mine employment and considered a smoking history of less than one pack of cigarettes per day for twenty-two years. Claimant presented to Dr. Hawkins with complaints of yellow sputum production, occasional nightly wheezing, dyspnea on walking 200 feet, daily cough, orthopnea, and paroxysmal nocturnal dyspnea. The physical examination revealed no significant abnormalities. Dr. Hawkins noted the chest X-ray showed no parenchymal abnormalities. The pulmonary function test revealed a mild airflow obstruction. Dr. Hawkins diagnosed Claimant with asthmatic bronchitis based on Claimant's symptoms of exertional dyspnea, chronic cough, and wheezing, as well as the pulmonary function testing. The physician stated the etiology of Claimant's asthmatic bronchitis is "reactive airway disease." (DX 12).

Dr. Allan R. Goldstein

Dr. Allen R. Goldstein (Board-certified in Internal Medicine and Pulmonary Disease) examined Claimant on September 30, 2003 and issued a report on October 3, 2003. Dr. Goldstein relied on the physical examination, chest X-ray, pulmonary function test, arterial blood gas study, electrocardiogram ("EKG") all dated September 30, 2003. The physician credited Claimant with twenty-two years of coal mine employment and considered a smoking history of one pack of cigarettes per week for eight years. Claimant reported he has had hypertension for six years, shortness of breath since 1989 or 1990, occasional wheezing and "smothering." Claimant also reported he has had a dry cough since 1983 or 1984 and sleeps on two pillows because of shortness of breath. Claimant wakes up nightly because of his shortness of breath.

Claimant also complained of "swimmy headedness" occurring since 1990. The physical examination revealed no significant abnormalities. The chest X-ray showed clear lung fields and no evidence of coal workers' pneumoconiosis. Dr. Hawkins noted the pulmonary function results and the arterial blood gas studies were normal. The EKG showed a right bundle branch block. Dr. Goldstein concluded Claimant's complaints suggest paroxysmal nocturnal dyspnea and orthopnea but no findings suggest coal workers' pneumoconiosis. (DX 33).

Dr. Joseph J. Renn, III

Dr. Joseph J. Renn, III (Board-certified in Internal Medicine and Pulmonary Disease) issued a report on March 31, 2004 based on a review of Claimant's medical records. Dr. Renn reviewed Dr. Hawkins' report dated November 26, 2002, Dr. Goldstein's report dated October 3, 2002, chest X-rays dated November 26, 2002 and October 30, 2003, pulmonary function tests dated November 26, 2002, February 12, 2003, and September 30, 2003, arterial blood gas studies dated November 26, 2002 and September 30, 2003, and EKG dated September 30, 2003. The physician noted Claimant's two physical examinations revealed no abnormalities. Dr. Renn stated the pulmonary function tests dated February 12, 2003 and September 30, 2003 showed a normal ventilatory function. The physician also noted the chest X-ray interpretations were uniformly negative for pneumoconiosis. Dr. Renn concluded that Claimant does not have pneumoconiosis or a ventilatory dysfunction.

I find the opinion of Dr. Claybon is not reasoned and not well-documented.[4] Dr. Claybon failed to explain how the evidence supports his diagnosis of pneumoconiosis, COPD, and chronic acute bronchitis. Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). Therefore, I find Dr. Claybon's opinion that Claimant has pneumoconiosis is entitled to no weight.

I find the opinion of Dr. Hawkins is reasoned, well-documented, and entitled to substantial weight. An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). Dr. Hawkins based his opinion on Claimant's symptoms, physical examination, and objective medical testing. The physician diagnosed Claimant with asthmatic bronchitis based on Claimant's symptomology. Asthmatic bronchitis may fall within the regulatory definition of pneumoconiosis if it is related to coal dust exposure. Robinson v. Director, OWCP, 3 B.L.R. 1-798.7 (1981); Tokarcik v. Consolidation Coal Co., 6 B.L.R. 1-666 (1983). However, Dr. Hawkins did not attribute Claimant's asthmatic bronchitis to coal dust exposure. Therefore, I infer the physician is of the opinion Claimant does not have pneumoconiosis.

[4] Although the evidence shows that Dr. Claybon is Claimant's treating physician, I do not give controlling weight to his opinion as relevant evidence in the record substantially contradicts the physician. § 718.104(d)(5).

I find the opinion of Dr. Goldstein is also reasoned, well-documented, and entitled to substantial weight. Dr. Goldstein considered Claimant's coal mine employment history, physical examination, chest X-ray, and results of objective medical testing in concluding Claimant does not have pneumoconiosis.

I find the opinion of Dr. Renn is also reasoned, well-documented, and entitled to substantial weight. Dr. Renn considered Claimant's coal mine employment history, physical examinations, chest X-rays, pulmonary function tests, and arterial blood gas studies in concluding Claimant does not have pneumoconiosis.

As no physician has offered the opinion that Claimant has pneumoconiosis, the new evidence of record does not support a finding of the presence of pneumoconiosis. Additionally, the new X-ray evidence does not support the finding of pneumoconiosis. Consequently, Claimant has failed to establish this element of entitlement.

2. Pneumoconiosis Arising Out of Coal Mine Employment

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish that the miner had pneumoconiosis arising out of coal mine employment pursuant to § 718.203.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant

to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as "qualifying" under the regulations. Assessment of pulmonary function study results is dependent on Claimant's height, which was most frequently noted to be 68 inches. I therefore used that height in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

The current record contains the pulmonary function studies summarized below.

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
11/26/02	DX 12	Dr. Hawkins	71	1.51	2.29	30	66%	Good	Yes
02/12/03	DX 12	Dr. Hawkins	71	2.62	3.68	94	71%	Good	No
09/30/03	DX 33	Dr. Goldstein	72	2.54	3.08	43	82%	Inconsistent	No

*post-bronchodilator

November 26, 2002 Pulmonary Function Study

This study produced qualifying values under the regulations. § 718.204(b)(2)(i). However, Dr. John A. Michos (Board-certified in Internal Medicine and Pulmonary Medicine) reviewed the study on January 22, 2003 and determined it was invalid. Dr. Michos invalidated the study based on the greater than 5% variation between the two best FVC and FEV1 values and a suboptimal MVV performance. (DX 12). As Dr. Michos is a highly qualified physician, I find his opinion is entitled to substantial weight. Additionally, no physician has contested Dr. Michos' conclusion. Therefore, I find the November 26, 2002 pulmonary function test is invalid.

February 12, 2003 Pulmonary Function Study

This study produced values that were non-qualifying under the regulations. § 718.204(b)(2)(i). The pulmonary function report contained the required flow-volume loop and tracings and a notation that Claimant's efforts were acceptable. Additionally, no evidence was submitted that challenged the validity of the test results. Therefore, I find that the February 12, 2003 pulmonary function test is valid.

September 30, 2003 Pulmonary Function Study

This study produced values that were non-qualifying under the regulations. § 718.204(b)(2)(i). The pulmonary function report contained the required flow-volume loop and

tracings and a notation that Claimant's efforts were inconsistent. It is well-established that pulmonary function tests are effort-dependent and no weight may be given to studies where Claimant puts forth poor effort. Houchin v. Old Ben Coal Co., 6 B.L.R. 1-1141 (1984). Accordingly, I find the September 30, 2003 pulmonary function test is invalid.

In sum, I find that the weight of the pulmonary function study evidence does not support a finding of total disability pursuant to § 718.204(b)(2)(i).

The current record contains the arterial blood gas studies summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
11/26/02	DX 12	Dr. Hawkins	39 42*	90 75*	No No*
09/30/03	DX 33	Dr. Goldstein	40	85	No

*post-exercise

The blood gas studies did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

The record contains the following medical opinions regarding total disability.

Dr. Claybon

Dr. Claybon opined Claimant is unable to perform any type of manual labor or job. The physician attributed Claimant's total and permanent disability to COPD, chronic acute bronchitis and pneumoconiosis.

Dr. Hawkins

Dr. Hawkins noted Claimant's November 26, 2002 pulmonary function test showed a "mild airflow obstruction." Additionally, the November 26, 2002 arterial blood gas study revealed adequate resting and exertional gas exchange. Based on this testing and Claimant's exertional dyspnea, the physician concluded Claimant has a mild to moderate impairment. Dr. Hawkins opined Claimant cannot perform manual labor and should avoid exposure to chemicals,

dusts, and fumes. (DX 12). As Dr. Hawkins opined Claimant cannot perform manual labor, I infer that the physician is of the opinion Claimant cannot perform his previous coal mine employment and is totally disabled.

Dr. Renn

Dr. Renn reviewed Claimant's pulmonary function tests dated November 26, 2002, February 12, 2003, and September 30, 2003. The physician noted Dr. Michos concluded the November 26, 2002 study is invalid. Dr. Renn opined the latter two studies produced values showing a normal ventilatory function. The physician concluded that Claimant is not totally and permanently impaired from a pulmonary standpoint and would be able to perform any of the coal mining jobs listed in his occupational work history or any similar work. (DX 33).

I find Dr. Claybon's opinion is unreasoned and not documented. A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). Dr. Claybon failed to explain how any of the evidence supports his conclusion. Therefore, I find Dr. Claybon's opinion that Claimant is totally disabled is entitled to no weight.

I find that Dr. Hawkins' opinion is unreasoned and not documented. In reaching his conclusion that Claimant was totally disabled, Dr. Hawkins relied, at least in part, on the November 26, 2002 pulmonary function test, which I find to be invalid. A medical opinion that relies on nonconforming pulmonary function tests may properly be given less weight. Arnoni v. Director, OWCP, 6 B.L.R. 1-423 (1983). Additionally, Dr. Hawkins' recommendation that Claimant should avoid further exposure to dust, chemicals, and fumes does not constitute a determination that Claimant is totally disabled. See White v. New White Coal Co., 23 B.L.R. 1-1 (2004). Therefore, I find Dr. Hawkins' opinion that Claimant is totally disabled is entitled to no weight.

I find Dr. Renn's opinion is reasoned and well-documented. Dr. Renn relied on the medical reports and objective medical testing in reaching his conclusion. While Dr. Renn based his conclusion, at least in part, on the September 30, 2003 non-conforming function study, I note that had Claimant's effort been better, the results of the studies could only have been higher, thus supporting Dr. Renn's conclusion that Claimant is not totally disabled. See Crapp v. U.S. Steel Corp., 6 B.L.R. 1-476 (1983). Therefore, I find Dr. Renn's opinion that Claimant is not totally disabled is entitled to substantial weight.

As previously noted, the pulmonary function tests and arterial blood gas studies do not establish total disability. The medical opinion evidence also fails to establish total disability. Based on the forgoing, Claimant has not established this element of entitlement.

4. Total Disability Due to Pneumoconiosis

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish total disability due to pneumoconiosis under § 718.204(c)(2).

F. Conclusion

As Claimant has not established by the new evidence any element of entitlement previously adjudicated against him, Claimant has not demonstrated a change in condition. Therefore, the claim must be denied.

ORDER

The claim of C.C. for benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).